The Self-Judging Clause and Self-Interest

In urging repeal of the Connally Reservation during the debate at the Pacific Northwest Regional Meeting of the American Bar Association, Mr. Larson argued that it is to the interest of the United States to repeal the "self-judging" Reservation because its existence provides a means by which any nation may evade the World Court's jurisdiction when the United States seeks to obtain redress in the court.

by Arthur Larson • ***Director of the World Rule of Law Center, Duke University***

MY ARGUMENT FOR the repeal of the "self-judging" clause in the American acceptance of the World Court's jurisdiction will be addressed solely to cold-blooded American self-interest. That self-interest is severely damaged because of the reciprocal right of every other nation in the world to invoke this clause against us and thus throw us out of court whenever we might attempt to vindicate a legal claim on behalf of our country or one of its citizens or corporations.

The story begins with the *Norwegian Loans* case. Norway had issued a large quantity of bonds in France, payable in gold. Then Norway went off the gold standard and refused to pay in gold. France, confronted with severe loss to hundreds of thrifty Frenchmen, brought suit in the International Court of Justice demanding payment in gold. France had a self-judging clause similar to our Connally Reservation. Norway did not. The International Court held that, as a matter of reciprocity, Norway could exercise France's claimed reservation and call the entire transaction domestic. Result: financial loss in cold cash to citizens in France. Cause: A supposedly protective clause interposed by the guardians of French interests. Sequel: France last year repealed her self-judging clause.

Since this case was decided only in 1957, the full implications have not begun to sink into the consciousness of the American Bar and the American people. If the position of the American Bar Association opposing the Connally Reservation was valid for reasons of self-interest in 1946, it is twenty times as valid today.

Let us put the present state of affairs in the bluntest possible terms. The presence of this self-judging clause in our declaration means that we ourselves have destroyed, absolutely and without exception, every conceivable right that we might ever have had to enforce any legal claim against any country under any circumstances for any damage to our rights under the general jurisdiction of the International Court of Justice. For now, whenever we try to assert as plaintiffs any legitimate right in the International Court, it is our opponents who merely have to utter the magic words, "This is domestic"—and we are thrown out of court with no legal recourse whatsoever. France found this out the hard way, and repealed her self-judging clause. Must we similarly have to subject innocent Americans to severe financial loss before we learn our lesson?

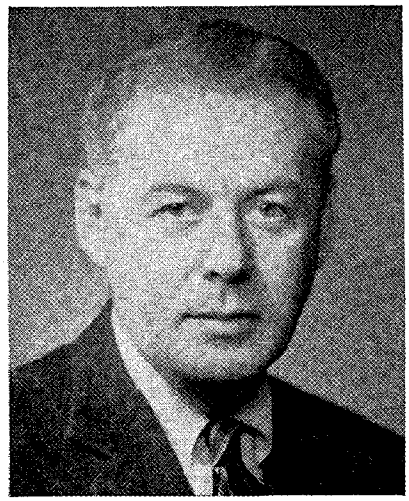
After all, we are the ones who need the protection more than any other country. We are the ones with $45,000,000,000 invested within other countries' boundaries, with the ever-present danger of damage, confiscation, and discrimination. We are the ones with 500,000 nationals and 700,000 tourists abroad, always in danger of personal injury and property damage. We are the ones with foreign bases, communications installations, transportation facilities, and economic and technical aid projects. The chances of our needing, as plaintiffs, the help of the court are many times as great as the chances of our appearing as defendant.

We would do well to recall the well-known lines of Robert Frost:

> Before I built a wall I'd ask to know
> What I was walling in or walling out.

The principal effect of what we have done is not so much to wall the other fellow out of court, as to wall ourselves out, whenever we have a valid claim.

One of the least-known features of this situation is the fact that this self-judging clause also destroys valuable rights under our economic aid programs that were specifically created in the name of national self-interest. The Economic Cooperation Act of April 3, 1948, stipulates that every economic aid agreement must include a provision "submitting for the decision of the International Court of Justice or of any arbitral tribunal mutually agreed upon any case espoused by the United States Government involving compensation of a national of the United States



Fabian Bachrach

Arthur Larson is now Director of the World Rule of Law Center at Duke University in Durham, North Carolina. His career has included private practice, teaching and government service. He has been Dean of the University of Pittsburgh Law School, Director of the U.S.I.A. and Special Assistant to President Eisenhower.

for governmental measures affecting his property rights, including contracts with, or concessions from, such country." But since the self-judging clause, complete with its reciprocal backlash, is incorporated by reference in all these agreements, we have thus once more completely and effectively destroyed at one stroke all the rights that supposedly were laboriously built up both in the statute and in the agreements for compulsory judicial settlement of disputes negotiated in the pursuance of the statute. Consequently, if the current debate were conducted on the basis of really intelligent self-interest, there would be no escape from the conclusion that the self-judging clause must be repealed in order to restore these rights of American citizens, businesses, and investors which we thought we were protecting, but which the self-judging amendment has destroyed.

There are other items of American self-interest at stake here, perhaps not so obvious and material, but in some ways even more important.

There is a strong self-interest in reestablishing our position as leaders in the struggle to bring about a lawful world. We might as well face the fact that the United States seriously needs at this very moment a tangible action to demonstrate our devotion to law in the eyes of the world. Indeed, we are already losing our opportunity for leadership here. France has repealed her self-judging clause. So has India. So has Britain.

The clause hurts our self-interest also because it makes us look foolish to intelligent people everywhere. There is nothing more elementary in every legal system of the world than that no man should be a judge in his own cause. To assert such a right on the domestic scene would make anyone a laughing stock. To assert it on the international scene is no less preposterous.

Our self-interest is also hurt because this declaration is probably invalid. Article 36, paragraph 6, of the Statute of the International Court, to which the United States is a party, and to whose provisions it is therefore committed as a matter of law, states:

> In the event of a dispute as to whether the Court has jurisdiction, the matter shall be settled by the decision of the Court.

Of course the greatest self-interest of all is the contribution this move would make toward a solid building of the practical dispute-settling procedures that are essential to achieving peace in a dispute-ridden world.

As against all these demonstrable values accruing to the self-interest of the United States, the arguments for retention of the Connally Reservation are found to consist entirely of imaginary fears which are never supported by citations of the record of the court, of the background and character and performance of the judges, or of the actual provisions of international law. They are based entirely on what "might" be done to our domestic affairs by an imaginary court, made up of altogether unheard-of judges applying international law resembling nothing that has ever been seen on this earth.

The claim that the court might make us raise our immigration quotas, lower our tariffs, and give away the Panama Canal—these three ugly sisters that have been wheeled out as the standard hobgoblins from the time of Senator Connally's remarks on the floor of the Senate right down to the present—are the result of two elementary fallacies. The one fallacy is the failure to distinguish between the judicial function and the legislative function; the other is the failure to distinguish between domestic and international affairs.

You cannot go at this question by sweeping statements that "tariffs are international". You have to specify *what question* about tariffs you are talking about. The question that opponents of repeal are really talking about is a question of policy on whether tariffs should be raised or lowered, or whether immigration quotas should be raised or lowered. That policy, in the first place, must be conceived and executed as a legislative act. A court can only apply the law as it finds it. It cannot compel Congress to pass laws that it does not want to pass or compel the President to make treaties he does not want to make. Moreover, the policy decision on whether to raise or lower tariffs or immigration quotas or make new treaties is a domestic policy decision. Similarly, as to the Panama Canal, no court can tell the President or the Senate to make a new treaty giving away the Panama Canal. This would be both an executive and a legislative act. The existing treaty has been reaffirmed by mutual consent as recently as 1955, and has been declared valid by the Supreme Court of Panama itself in *Gris* v. *The New Panama Canal Co.*, and in every international law decision or source that can be found on record. There is not one ounce of support in all of existing international law to support the charge that the International Court could make us raise or lower tariffs or immigration quotas or part with the Panama Canal against our will.

This being so, the arguments of the defenders of the Connally Reservation can be narrowed down to the fantastic assumption that the members of the present court, who comprise some of the most distinguished and conservative judges and international law experts in the world, and who have compiled a consistent record of very

careful limitation of their jurisdiction to clearly international affairs, will suddenly simultaneously all lose their minds and start making decisions the flat contrary of what they have made for several decades. And this assumption is made in spite of the fact that the judges hold office for nine years, so that the character of the court could not possibly change radically in the period of time covered by a new declaration. All this then is precisely the sort of thing any court in the land would reject as "speculation and conjecture". Perhaps this would not matter, if this were only an academic discussion. But, as I have shown earlier, we are allowing these chimeras and day-dreams to deprive us of protection of very real legal rights that may be worth hundreds of millions of dollars to American individuals, corporations, and national interests, and we are allowing these hypothetical fears to rob us of very real and present prestige, international leadership, and opportunities for practical improvement in the dispute-settling structure that is essential to a real peace.

Since the opposition talk entirely in terms of fears, let me plant one little fear in their minds that they might think about. It is quite conceivable that the spark which sets off the nuclear war ending civilization and possibly even life on earth might be a dispute which could have been settled by judicial means, if we had used these precious years to strengthen the structure of international law and adjudication. It might be another Suez; it might be the Gulf of Aqaba; it might be one of the many boundary or waters disputes now festering in the world. If that day should ever come, I would not want to be in the shoes of those who used their efforts to block the development of dispute-settling processes that could have kept that spark from setting off the final holocaust.

But I am confident that day will never come, because I am confident that the lawyers of America will continue to take the lead in doing the solid constructive work, including strengthening our own use of the World Court, that is necessary to build that rule of law between nations which many of us now believe may be the last, best hope of earth.

American Bar Association—Election for State Delegates

Jurisdiction	Delegates Elected	Ballots Mailed	Ballots Returned	Percent of Return
Arizona	C. A. Carson III, Phoenix	732	461	63
Connecticut	Samuel H. Platcow, New Haven	1647	579	35
District of Columbia	Francis W. Hill, Washington	3335	1033	31
Illinois	Barnabas F. Sears, Chicago	6198	3817	62
Iowa	Ingalls Swisher, Iowa City	1568	881	56
Maine	Robinson Verrill, Cumberland Foreside	336	168	50
Massachusetts (Vacancy)	*Erwin N. Griswold, Cambridge	2254	1236	55
Michigan	Henry L. Woolfenden, Detroit	2867	1644	57
Mississippi	Gibson B. Witherspoon, Meridian	749	560	75
Montana	Emmett C. Angland, Great Falls	395	312	79
Nebraska	George H. Turner, Lincoln	933	484	52
New Jersey	John H. Yauch, Jr., Newark	2294	1131	49
Oklahoma	Howard T. Tumilty, Oklahoma City	1554	929	60
Puerto Rico	Francisco Ponsa-Feliu, San Juan	174	41	24
Rhode Island (Vacancy)	†Colin MacR. Makepeace, Providence	524	237	45
South Carolina	Walton J. McLeod, Jr., Walterboro	647	358	55
South Dakota	Roy E. Willy, Sioux Falls	308	153	50
Texas	Cecil E. Burney, Corpus Christi	4534	2639	58
Washington	Richard S. Munter, Spokane	1703	1195	70
Wyoming	Edward E. Murane, Casper	256	162	63
		33,008	18,020	55

*To fill vacancy expiring with adjournment of 1962 Annual Meeting.
†To fill vacancy expiring with adjournment of 1961 Annual Meeting.